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In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 499

THE MOFFAT TUNNEL LEAGUE, A VOLUNTARY ASSOCIATION, and Uintah Basin Railroad League, a Voluntary Association, appellants

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, The Denver & Rio Grande Western Railroad Company, et al., appellees

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS

The opinion of the District Court (R. 121) is reported in 59 F. (2d) 760. The report of the Interstate Commerce Commission, hereinafter called the Commission, made in connection with the order or certificate which appellants sought to have set aside (R. 15) is reported in *Denver & Salt Lake Ry.*

Co. Control, 170 I. C. C. 4. The reports and orders of the Commission authorizing the construction of the Dotsero cut-off from which the last-named proceeding arose, are reported in *Proposed Construction by Denver & Salt Lake Western Railroad Company,* 154 I. C. C. 51, 175 I. C. C. 535. (R. 143–162.)

JURISDICTION

The suit was commenced October 14, 1931, under the Urgent Deficiencies Act of October 22, 1913 (38 Stat. 219, U. S. C. Title 28, Sec. 47) to enjoin, set aside, and annul the Commission's certificate of public interest, authorizing the Denver & Rio Grande Western Railroad Company (hereinafter called the Rio Grande) to acquire stock control of the Denver & Salt Lake Railway Company (hereinafter called the Moffat). (R. 3.) On July 17, 1932, the final decree of the court was entered denying appellants' motion for temporary injunction and dismissing the bill of complaint upon the merits. (R. 131.)

On July 18, 1932, this appeal was duly allowed by said District Court. (R. 133.) Jurisdiction is conferred on this Court by the Urgent Deficiencies Act of October 22, 1913.

QUESTIONS PRESENTED

1. Whether appellants, being unincorporated voluntary associations acting in their own names without any natural person or corporate entity

appearing as a party plaintiff, have the capacity to maintain this suit.

2. Whether appellants, who purport to represent citizens and residents of localities which may be indirectly affected by the possible results of one railroad company holding stock control over another, have the necessary legal interest and standing to maintain suit under the Urgent Deficiencies Act to set aside the Commission's order authorizing such acquisition.

3. Whether because the Commission rejected certain evidence as irrelevant, its order was made without a "hearing" as required by the statute.

STATUTES INVOLVED

The statutes considered material to the determination of the questions involved in this case will be found in the Appendix (Infra, p. 38).

STATEMENT

This is a suit to set aside an order of the Commission made pursuant to paragraph (2) of Section 5 of the Interstate Commerce Act (See Appendix, Infra, p. 38) approving and authorizing the acquisition by the Rio Grande of the control of the Moffat by stock ownership. The said application is closely connected with other proceedings involving railroad development in the vicinity, and they will therefore be included in this statement along with a description of the railroads of the locality.

The Moffat railroad extends westward from Utah Junction, Colo. (Denver), through the Moffat Tunnel to its western terminus at Craig, Colo., a distance of 232 miles. Its original promoters hoped to build on across central and western Colorado to Provo or Salt Lake City, Utah, but after going through receivership and reorganization the property was in 1926 acquired by new interests which have no present intention of extending the line to the west beyond Craig. (See Denver & Salt Lake Reorganization, 117 I. C. C. 397.)

The Moffat Tunnel was constructed under authority of the State of Colorado by the Moffat Tunnel Commission of the Moffat Tunnel Improvement District (a taxing district including all the area that the appellant Moffat Tunnel League purports to represent). At a cost in excess of $15,200,000 railway and water tunnels, side by side, were driven through the mountains. The railway tunnel was leased to the Moffat, which began operating through it in February, 1928.

In 1925 the Salt Lake & Denver Railroad Company, sponsored by the Bamberger interests of Salt Lake City, applied to the Commission, under Section 1 (18) of the Interstate Commerce Act, for a certificate of public convenience and necessity authorizing the building of a line from Craig through the Uintah Basin to Provo, Utah. (*Proposed Construction by Salt Lake & Denver R. R.*, Finance Docket 4713.) The Moffat did not appear in op-

position. A Commission examiner, after extensive hearings, submitted a proposed report which recognized the need of a railroad through the country between Craig and Provo, but pointed out that the record did not contain evidence of sufficient financial support for the proposed line, and recommended that the Commission deny the application without prejudice. (R. 102–4.) Formal exceptions were filed by the applicant and by several interveners who favored the construction of the road, but no exceptor has as yet moved to have the proposed report and exceptions submitted to the Commission for final determination. Technically, the case is still pending before the Commission upon the proposed report and the exceptions, but practically the project may fairly be considered as abandoned. Apparently no other interests have since seriously contemplated the extension of the Moffat line westward from Craig.

The line of the Rio Grande begins at Denver and runs southward through Pueblo, and thence westwardly, by a route made devious by the mountainous country traversed, to Provo and Salt Lake City, Utah. Dotsero, 343 miles from Denver by the circuitous Rio Grande route, is 41.3 miles from Orestod, Colo., a point on the Moffat only about 130 miles from Denver via the Moffat. In April, 1929, the Commission issued a certificate authorizing the Moffat, through a subsidiary to build a connection (called the Dotsero cut-off) between the

existing Moffat line and the Rio Grande (see *Proposed Construction by Denver & Salt Lake Western Railroad Company,* Finance Docket No. 4555, 154 I. C. C. 51). At the hearing in the proceeding, which involved the granting of certificate of convenience and necessity for the Dotsero cut-off, the application was opposed by the Bamberger interests, which, as shown above, had made and, in effect, abandoned an application for a certificate to build westward from Craig. Opposition was also presented by certain interests in Utah which were desirous of a railroad westward from Craig through the Uintah Basin and thought that the building of the Dotsero cut-off would prejudice that project. The Rio Grande intervened in the proceeding and favored the application, provided that it be permitted to operate its trains over the cut-off and over the Moffat line between Orestod and Denver. The Commission found that the construction was justified upon the condition asked by the Rio Grande. The railroads concerned were directed to negotiate the contracts for the joint use and trackage rights above outlined, the Commission reserving the right to settle the terms thereof in event of failure to agree.

On February 1, 1930, the Rio Grande, having secured an option upon certain shares of the Moffat's common stock which, together with shares previously acquired, would aggregate 57.94 per cent of the total outstanding stock of the Moffat, applied

to the Commission for authority to acquire control of the Moffat by the ownership of a majority of its stock. The two voluntary associations, which are appellants here, intervened in opposition to the application. The State of Colorado, Colorado Public Utilities Commission, The Moffat Tunnel Improvement District, official bodies, the Moffat Tunnel Taxpayers Association, Denver Real Estate Exchange, and numerous other voluntary citizen's associations intervened to demand that the Commission impose conditions looking to the just and equitable treatment of the district west of Craig, the building of the Dotsero cut-off and the establishment of joint rates over a connection that might thereafter be built between Craig and Utah points.

On December 2, 1930, the Commission rendered its report reciting its order in the Dotsero Cut-off case (154 I. C. C. 51) and its instructions to the Moffat and the Rio Grande to draft and submit contracts under which the Rio Grande should have trackage rights over the new track and the Moffat line into Denver. The inability of the companies to come to an agreement relative to trackage rights, the consequent delay in the issuance of the certificate in the construction case and the beginning of work upon the much-needed Dotsero cut-off is stated. The Commission found that the control in question would be in accord with its general consolidation plan, that it would facilitate the early construction of the Dotsero cut-off, and hence that the

acquisition by the Rio Grande of control of the Moffat by purchase of its capital stock would be in the public interest, provided: (1) That the Rio Grande would purchase for cash, at a price not exceeding $155 a share, all shares of the Moffat which might be offered to it within a specified time; (2) that it would join in such through routes over any railroad thereafter constructed through the Uintah Valley between Craig and Utah points as the Commission might in subsequent proceedings find to be reasonable and in the public interest, and (3) that it would commence, or cause to be commenced, the construction of the Dotsero cut-off within six months after the date of the order and would proceed to the completion of such construction within a specified time. (170 I. C. C. 4, R. 18–34.) These conditions constitute substantial compliance with the suggestions made by the interveners in the proceedings.

In July, 1931, the Rio Grande having executed a written acceptance of all the conditions above outlined, the *Construction case,* No. 4555, and the *Control case,* No. 8070, were both called to the attention of the Commission and on September 15, 1931, the Commission issued supplemental reports in each of said proceedings. (175 I. C. C. 535, R. 13; 175 I. C. C. 542, R. 154.) The Commission by formal order authorized the Rio Grande to acquire control of the Moffat (R. 15), and in the *Construction case,* by supplemental order authorized the construction

as prayed by the Moffat subsidiary, Denver & Salt Lake Western Railroad Company. (170 I. C. C. 4, R. 18; 175 I. C. C. 542, R. 13.) The above-mentioned order in No. 8070, the *Control case,* is the order attacked in this suit.

The appellants in their complaint in the case at bar say they are two "unincorporated voluntary associations" organized respectively to promote the commercial interests and development of adequate railroad facilities for the counties of Moffat, Route, and Grande in Colorado, and Uintah and Duchesne in Utah, alleging that the area of all the counties named is known collectively as the Uintah Basin. They had intervened at the hearing before the Commission and opposed the granting of the application. The complaint in this case named no individuals as members or officers of the alleged organizations and the testimony before the Commission was likewise indefinite upon that point.

The Court was asked by appellants to set aside the Commission's order upon these two grounds: First, that the order of the Commission is entirely unsupported by the evidence and is therefore illegal, null, and void (paragraph VIII of the complaint), and, second, that the Commission held no "hearings" as required by the Act, by reason of the fact that the examiner excluded from the record certain evidence offered at the "purported hearings" of the case (paragraph VI of the complaint).

(The appellants, on appeal, have abandoned the first ground of objection to the order.)

All interveners before the Commission, except the appellants, seem to have been satisfied that the conditions imposed afforded them the protection desired, since none save the appellants appear as plaintiffs in this suit to set aside the order with its conditions; and the State of Colorado, Colorado Public Utilities Commission, Moffat Tunnel Improvement District, and the Moffat Tunnel Commission intervened before the lower court in support of the Commission's order.

The United States, the Commission, and the interveners defended upon the grounds (1) that the plaintiffs, being unincorporated voluntary associations and naming no individual as their sponsor, could not bring suit in a Federal court; (2) that they had no standing to institute the action under the Urgent Deficiencies Act; (3) that there was a hearing before the Commission as required by law, and (4) that there was in the record substantial evidence to sustain the Commission's order. (R. 37–59.) The only evidence before the Court was a duly certified copy of the record, including the evidence, in the stock-control proceeding before the Commission and the reports and orders of the Commission in the Dotsero Construction case. (R. 37–59.) The three-judge court sustained the defendants and interveners on all points. (R. 120–131.) It held that though by statute voluntary unincorporated associations were authorized to intervene before the Commission, such organizations

lacked the capacity to sue in the Federal courts; further, that aside from this legal infirmity, plaintiffs had not shown such an interest or right in the subject matter of the Commission's order or any injury to any right or interest such as would give them standing to originate and prosecute the suit; that the requirements of the statute as to hearings before the Commission had been complied with and that there was substantial evidence in the record to sustain the order. Wherefore the Court dismissed the suit and plaintiffs have perfected their appeal to this Court.

SUMMARY OF ARGUMENT

I. Neither of the two appellants has the capacity to bring and maintain this suit. They are unincorporated voluntary associations. Neither has legal entity or identification either as a corporation or natural person. No natural person claiming to be a member of either association joined in bringing the suit. Hence, the complaint discloses no capacity whatever in appellants to bring this suit, for "only natural persons or corporations may sue or be sued by their respective names in the national courts." *Beavers* v. *McMillan et al.*, 44 F. (2d) 668 (U. S. D. C. N. D. Tex.); *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 385; *Great Southern Fireproof Hotel Co.* v. *Jones*, 177 U. S. 449, 455; *Chapman* v. *Barney*, 129 U. S. 677, 682.

Nor can it be contended that this is a "class suit," for again the necessary natural person repre-

senting the class does not appear as a party plaintiff. On the contrary, appellants bring this suit solely in the names of their unincorporated associations. See *Milheim et al.* v. *Moffat Tunnel Improvement District et al.*, 262 U. S. 710. Again, appellants' lack of capacity to sue may not be supplied upon the theory that they are within the excepted class of unincorporated associations within the purview of this Court's decision in *United Mine Workers* v. *Coronado Coal Co., supra.*

II. Appellants have not shown that any independent legal right of their own is violated or affected by the Commission's order, hence, they have no standing to maintain this suit. *Pittsburgh & West Va. Ry.* v. *United States,* 281 U. S. 479; *Sprunt* v. *United States,* 281 U. S. 249. Their only real interest is the construction of a railroad through the counties of Colorado and Utah in which their members reside. The only injury claimed by them is their fear that control of the Moffat by the Rio Grande may lessen the anticipated possibility of such construction in the future. Thus, appellants' alleged interest in the order is insufficient to enable them to maintain this suit, and the threatened injury alleged is indirect and too remote to entitle them to equitable relief.

Nor does the fact that appellants were permitted to intervene before the Commission supply their lack of right or standing to maintain this suit. This Court held in *Pittsburgh & West Va. Ry.* v.

United States, supra, at page 486, that "the mere fact that the appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it," citing *Sprunt & Son* v. *United States, supra.* Appellants' position is unlike that of complainants in the *Chicago Junction Case,* 264 U. S. 258, who, by express provision of section 3 of the Act entitling them to equality of treatment from other carriers, had sufficient legal interest through declaration of statutory right, to maintain their suit.

III. The hearing accorded by the Commission adequately satisfied all rights of appellants. The contention that the hearing was inadequate is based upon the Commission's refusal to admit certain testimony, most of which was offered by parties other than appellants. As to this, the District Court was right in holding that it was a matter of which appellants could not complain. Moreover, the proffered testimony was essentially cumulative, the Commission already having similar evidence before it in the same record. Further, the testimony offered was irrelevant, for it was based on appellants' desire to have the Moffat road extend its line westward from Craig and the need of that community for transportation services, and was speculative in that it would disclose merely the fear of appellants that the possibility of construction of

the desired extension would be more remote if the Rio Grande were permitted to acquire control of the Moffat. The issue before the Commission was whether that control was in the public interest, and not whether the Moffat road should be extended westward. Even if the latter had been an issue in that proceeding, rejection of the proffered evidence would not have violated appellants' constitutional rights to a hearing, for the Commission was without authority to require the extension to be constructed. *Interstate Commerce Commission* v. *Oregon-Washington, etc., Company*, No. 23, October Term, 1932, decided January 9, 1933. Finally, the mere fact that the Commission rejected some testimony does not render the order void, if there was sufficient evidence before it to justify the action taken. *Spiller* v. *Atchison, etc., Ry. Co.*, 253 U. S. 117, 126; Cf. *United States* v. *Abilene & Southern Ry. Co.*, 265 U. S. 274.

ARGUMENT

I

Appellants are two unincorporated associations; they are not legal entities and hence lack the capacity to bring and prosecute this action

(1) The two appellants are neither natural persons nor corporations. The complaint alleges that they are "unincorporated voluntary associations" and contains no information as to the identity of the members thereof. The legal capacity of the plaintiffs to bring the suit is denied by all

defendants and interveners. The evidence before the Commission contains the name of no individual as being represented by either of the associations; nor is it alleged that residents (as a class) of the Colorado and Utah counties mentioned have designated the plaintiffs as their representatives.

The plaintiff associations, we submit, come under the rule stated in *United Mine Workers* v. *Coronado Co.*, 259 U. S. 344, wherein this Court, in considering the liability of the United Mine Workers of America, an unincorporated labor union, to suit in its association name, said (p. 385):

> Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member. *Pickett* v. *Walsh*, 192 Mass. 572; *Karges Furniture Co.* v. *Amalgamated Woodworkers Local Union*, 165 Ind. 421; *Baskins* v. *United Mine Workers of America*, 234 S. W. 464.

It is true that in the case above cited this Court held that a suit in equity would lie *against* the unincorporated labor union, but the opinion (pp. 385–392) indicates that the Court considered that labor unions constituted an excepted class of unincorporated voluntary associations in connection with liability to suit in the association name. This because of the commonly accepted recognition of

such organizations as legal entities in numerous enactments by both national and state legislative bodies and of the almost exclusive dominance of such organizations within the realm of labor matters. A careful reading of the considerations which moved this Court to hold that the United Mine Workers of America was a legal entity and subject to be sued under that name for damages resulting from its action, will indicate that such considerations can not be attributed to the unincorporated associations which have attempted to bring the instant suit. They undoubtedly come within the rule stated in *Beavers* v. *McMillan et al.*, 44 F. (2d) 668 (N. D. Tex.), where the Court said:

> Only natural persons or corporations may sue or be sued by their respective names in the national courts. If an unincorporated association or society seeks entry it can only do so by and through its members, who must be brought into the record by positive averment.

See also *Brown* v. *Protestant Episcopal Church*, 8 F. (2d) 149, 150 (E. D. La.). Such an unincorporated association is not a legal entity so that it may in law be deemed to be the citizen of a particular state. See *Great Southern Fire Proof Hotel Co.* v. *Jones*, 177 U. S. 449, 455.

In *Chapman* v. *Barney*, 129 U. S. 677, 682, this Court held that an express company, alleged to be a joint stock company organized under the law of the State of New York, could not be a *citizen* of

that state within the meaning of the statutes regulating jurisdiction.

Since no individual nor legally incorporated association of individuals appears as plaintiff, we submit that under the authorities cited, the plaintiffs have shown no capacity to institute and prosecute this suit.

(2) Nor can it be contended that the suit is what is known as a class suit. Such a suit is thus described in Foster's Federal Practice, Section 114 (p. 701):

> Where a number of persons have a common interest in a thing which is the subject of litigation * * * *one or more* may sue or be sued on behalf of the rest.

Equity Rule 38 is as follows:

> When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.

The textbook above quoted from, further states:

> A class suit can not be maintained unless the persons interested are numerous. Such bills were dismissed when so far as appeared there were only two in one class and in another class three persons entitled to the relief sought. *The bill must show the names and residences of the persons interested who are omitted so far as they are known to the complainant.* (Foster's Federal Practice, Sec. 15, p. 705.) (Italics ours.)

A typical class suit was before this Court in *Milheim et al.* v. *Moffat Tunnel Improvement District et al.*, 262 U. S. 710, where a designated individual, Milheim, together with other named individuals, brought suit on behalf of themselves and other landowners in the Moffat Tunnel Improvement District, attacking the validity of certain special tax assessments. The procedure in the case cited is, we submit, very different from that followed in the case at bar where the action is instituted and prosecuted by mere names without any natural person or legal entity appearing.

In view of the fact that the Court has before it the name of *not a single individual* as the representative of the class on whose behalf this suit purports to have been brought, it is clear that the suit can not be maintained under the "class rule."

II

The position of appellants with respect to the Commission's order is such that they have no standing to invoke equitable relief

In addition to appellants' incapacity to bring this suit, we submit that they have no standing with respect to the order involved which would entitle them to have it set aside by a court of equity. To maintain a suit against an order of the Commission, a complainant must show that but for the intervention of a court of equity, an independent legal right of his own will be violated by the order. *Pitts-*

burgh & West Va. Ry. v. *United States,* 281 U. S. 479.

Even assuming that the unincorporated associations now before this Court might in this suit legally represent certain residents and property owners in the territory described in the complaint, there is no contention that the commission's order will subject such residents and property owners to *any special injury or damage.* The injury feared by appellants is an indirect harm which they anticipate may result from the Commission's order to every citizen and property owner. Such property owners' interest is clearly insufficient to give them the necessary standing independently to institute suit to annul the order. This point is emphasized by the fact that the State of Colorado, the Moffat Tunnel Improvement District, all the members of the Moffat Tunnel Commission organized under authority of the State of Colorado, the Colorado Public Service Commission, which bodies, as this Court said in *Int. Com. Comm.* v. *Oregon-Washington etc. Co.,* —U. S. —, N. 23, decided January 9, 1933, officially represent the interest of their localities in obtaining adequate transportation service, have intervened as defendants in this case *supporting the order.*

In *Sprunt* v. *United States,* 281 U. S. 249, the Court, after referring to the fact that participation in a proceeding before the Commission did not of itself confer upon a party the right to bring an

original suit to set aside the order of the Commission, said (pp. 255–256):

> * * * Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier.
>
> In the case at bar the appellants have no independent right which is violated by the order to cease and desist. They are entitled as shippers only to reasonable service at reasonable rates and without unjust discrimination. If such service and rates are accorded them, they can not complain of the rate or practice enjoyed by their competitors or of the retraction of a competitive advantage to which they are not otherwise entitled. The advantage which the appellants enjoyed under the former tariff was merely an incident of, and hence dependent upon, the right, if any, of the carriers to maintain that tariff in force and their continuing desire to do so. * * * Since the appellants' economic advantage as shippers was an incident of the supposed right exercised by the carriers, the appellants can not complain after the carriers are satisfied or prefer not to press their right, if any.

Appellants base their complaint solely upon the need of a railroad westward from Craig, but it is not contended that they have any legal right to

require of any one the construction of such extension. *Int. Com. Comm.* v. *Oregon-Washington, etc., supra.* Any advantage which they may have in the Dotsero cut-off not being constructed, or not being controlled by the Rio Grande when constructed, is obviously dependent upon the mere *possibility* of some person or company building a line through the Uintah Valley. Nor can the appellants be said to have established in a legal sense that the Rio Grande's acquisition of control over the Moffat would weaken the possibility of the westward extension from Craig. Moreover the Commission has made it a condition of the acquisition of control that the Rio Grande shall be a party to joint rates over any extension west from Craig and the Rio Grande has formally accepted the condition. Hence the new situation affords a greater *chance* for a railroad through the Uintah Basin to Utah because now *any* interest may build with assurance of through route and rate participation, whereas originally only the Moffat could build with that certainty.

We submit that the conclusion of the lower court on this point is correct, as stated in its opinion. (R. 128.)

> * * * We therefore find that the plaintiffs, being voluntary, unincorporated associations, can not as such maintain this suit; that, aside from this legal infirmity, these associations have not shown such an interest or right in the Commission's order

or proved a threat of an injury resulting from its enforcement that would authorize them to maintain this action; and, finally, that this legal disqualification is not cured or aided by the statute (28 U. S. C. A., Sec. 45a), in that it does not give them a right to institute this action solely because of their position as intervenors in the proceedings before the Commission. * * *

III

The fact that the appellants were permitted to intervene in the proceeding before the Commission would not of itself confer upon unincorporated associations, nor upon persons only indirectly affected by the Commission's order, the power or right to bring suit to annul the order

In their brief the appellants say that they have the necessary capacity to maintain the instant suit because they were permitted by statute to appear in the Commission proceeding. They cite Section 45a, Title 28, U. S. C. A.; Section 212, Commerce Court Act, 36 Stat. 539, 1167; but they cite no decision in which the question of the capacity of an unincorporated association to bring suit in a Federal court has been determined. All the cases cited involved the question whether the legal rights of the plaintiffs in these cases would be so affected by the Commission's order, as to enable them to maintain the suits. At the opening of their argument upon this point, the appellants assert that "parties" having the "necessary" interest in the subject matter are not barred from instituting and

maintaining a suit to set aside an order of the Commission merely because they are unincorporated associations. But no authority is cited as to whether an unincorporated association is a "party" in a legal sense or what interest in the subject matter is "necessary."

The appellants rely on the *Chicago Junction Case* (*Baltimore & Ohio R. Co.* v. *United States*), 264 U. S. 258, in which there was no question as to the identity or legal entity of the plaintiffs. The real question was whether the plaintiffs had a sufficient legal interest in the subject matter of the Commission's order necessary to enable them to maintain the suit to set it aside. It is true that in the course of the opinion the Court uses language which the appellants in the present case construe as holding that any individual or group of individuals, or any incorporated or unincorporated association which has properly been permitted to appear before the Commission in a proceeding, can maintain a suit under Urgent Deficiencies Act to set aside the order issued in such proceeding. But the holding of this Court was that the Baltimore & Ohio, a railroad which had formerly made use of the terminal roads over which the New York Central was permitted to acquire control, was entitled to maintain the suit to set aside the order because it had a right by statute to equality of use and treatment with respect to the connecting roads, which legal right might be jeopardized by the control authorized.

The Court said, in speaking of the prospective loss of revenues to the Baltimore & Ohio (p. 267):

> This loss is not the incident of more effective competition. * * * It is injury inflicted by denying to the plaintiffs equality of treatment. To such treatment carriers are, under the Interstate Commerce Act, as fully entitled as any shipper.

That the Baltimore & Ohio could maintain the suit, not because it had appeared before the Commission in the proceeding which resulted in the order attacked, but because this Court considered it to have a substantive legal right to equality of treatment by the terminal lines, is borne out by the language used by Mr. Justice Sutherland in his dissenting opinion (concurred in by Mr. Justice McReynolds and Mr. Justice Sanford) where it is stated (p. 273):

> The decision of the court here proceeds upon the theory that the injury complained of *is a denial of equality of treatment in the use of the terminals; but I do not understand this to be the gravamen of the bill.* The complaint is of inequality of opportunity to get business—not of opportunity to use the terminals. * * * (Italics ours.)

In subsequent cases this Court has very clearly corrected any erroneous conclusion which might be drawn from its language in the *Chicago Junction Case, supra.* In *Sprunt & Son* v. *United States, supra,* this Court, in considering the standing of a

shipper to bring a suit to set aside an order of the Commission which directed the elimination of a rate differential and thereby deprived the plaintiffs of an advantage over other competitors, said (pp. 254, 255):

> * * * The employment of this advantage gave them a distinct interest in the proceeding before the Commission under Section 3 of the Interstate Commerce Act. For their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under Section 212 of the Judicial Code to intervene, as of right in any suit "wherein is involved the validity" of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. * * * And his independent right to relief is no greater where by intervention or otherwise he has become a party to the proceeding before the Commission or to a suit brought by a carrier.

In *Pittsburgh & West Va. Ry.* v. *United States,* supra, the Court said (p. 486):

> The District Court held that the appellant was entitled to bring this suit under the Urgent Deficiencies Act to set aside the order, because it had intervened in the proceedings before the Commission, and because it is a connecting carrier and a minor-

> ity stockholder of the Wheeling. The court erred in so holding. The mere fact that appellant was permitted to intervene before the Commission does not entitle it to institute an independent suit to set aside the Commission's order in the absence of resulting actual or threatened legal injury to it, *Alexander Sprunt & Son* v. *United States, ante,* p. 249.

The two cases above cited show very clearly that participation in Commission proceedings does not of itself establish the right of a party to maintain a suit under Urgent Deficiencies Act to set aside a Commission order.

Appellants, being neither natural nor artificial persons, and having no legal interest in the subject matter of the Commission's order, and being affected thereby only as members of the community in general, have neither capacity nor standing to maintain this suit.

IV

The Commission's hearing which resulted in the order attacked by appellants fully complies with the requirements of the statute

The appellants contend that the Commission failed to hold a hearing as required by Section 5 (2) of the Interstate Commerce Act because the examiner excluded as immaterial and irrelevant certain testimony which had no bearing upon the question whether the control of the Moffat by the

Rio Grande would be in the public interest. The language of the statute is—

> Whenever the Commission is of opinion, after hearing, * * * that the acquisition, * * * by one of such carriers of the control of any other such carrier or carriers * * * will be in the public interest, the Commission shall have authority * * * to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

In their complaint (par. VI, R. 6) the appellants set out thirteen specifications of testimony which they say was offered and excluded by the Commission examiner, the action of the examiner being subsequently approved and adopted by the Commission. Such testimony, according to the appellants, would have tended to prove—

(1) That the Moffat was originally planned to extend westward from Craig and that this fact was generally known and discussed, numerous settlers being induced to locate in the Uintah Basin because the Moffat, Government agents and commercial bodies held out prospects of the extension, and that such settlers have since left and give as their reason for so doing the continued lack of railroad facilities.

(2) Statistics as to the natural and industrial resources, and the population of the Uintah Basin,

and the opinions based thereon that the area needs railroad facilities.

(3) That the purpose of the Moffat Tunnel was to aid the extension of the Moffat west from Craig, as well as the existing Moffat line to Craig, and the Dotsero cut-off; that the Moffat Tunnel District in assessing benefits for the purpose of taxation to pay the cost of the tunnel considered the likelihood of the extension westward from Craig; that the possibility of such extension as a part of a new through route was stressed in campaigns, which resulted in enactment of legislation under which the Tunnel District has been organized and the tunnel constructed; that the inhabitants of the present Tunnel District voted for the construction and "the people in the territory which would be benefited by the acquiring of the Moffat Railroad by the Rio Grande consistently voted against it"; that the people of the District would not have consented to taxing themselves to pay for the tunnel if the hope of a westward extension had not been held out to them.

(4) The details of the cost, the need for, the traffic effects, and the public necessity of the Dotsero cut-off.

(5) Surmises that the Rio Grande by its control of the Moffat would divert traffic from and ruin the Moffat financially, and that it would destroy the coal-mining industry along the line of the Moffat, since it was in competition with coal industry along the line of the Rio Grande.

(6) That the Rio Grande has at all times been opposed to the extension of the Moffat westward from Craig.

It is well established that in proceedings before the Interstate Commerce Commission the mere admission of specific testimony, which, under the strict rules of evidence such as are applied in court proceedings, should have been excluded, will not invalidate an order of the Commission. Conversely the exclusion of evidence which might of itself have been admissible will not warrant a court in setting aside an order of the Commission if it conforms with the law, is supported by substantial evidence, and it appears that the hearing resulted in a substantial presentation of the material facts involved. A large degree of latitude is allowed the Commission in its investigations. This Court said in *Spiller* v. *Atchison, etc., Ry. Co.*, 253 U. S. 117, 126:

> These provisions [sections 13, 16 and 17 of the Interstate Commerce Act] allow a large degree of latitude in the investigation of claims for reparation, and the resulting findings and order of the Commission may not be rejected as evidence because of any errors in its procedure not amounting to a denial of the right to a fair hearing, so long as the essential facts found are based upon substantial evidence.

While the above paragraph referred to investigation by the Commission of claims for reparation, the investigation of applications for certificates of

public interest would obviously involve at least as large, if not a larger, degree of latitude. See also *United States* v. *Abilene & S. Ry. Co.*, 265 U. S. 274; *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25. The Court does not review a proceeding before the Commission as upon appeal or writ of error. Its scope is not so extensive. (*Spiller* v. *Atchison, etc. Ry. Co., supra.*)

Hence, we submit the appellants here must demonstrate not merely the technical competence and relevancy of the evidence offered, but further that without the evidence excluded there could be no trustworthy determination of the question whether the acquisition of control involved was in the public interest. It must be a failure on the part of the Commission to give consideration to an essential element of the subject matter involved, not merely the exclusion or ignoring of particular evidence, in order to warrant the setting aside of the Commission's order. (Compare *Texas & Pacific Ry. Co.* v. *Interstate Commerce Commission*, 162 U. S. 197, 205, 207.)

Most of the substantive facts which the excluded testimony tended to prove were already before the Commission; that the extension of the Moffat westward from Craig was planned, hoped for, expected and advertised was an accepted fact; that it was hoped that the tunnel would result in this and other needed railroad construction west of the Continental Divide was never questioned. The plan by which the tunnel was financed and its approxi-

mate cost appear in Commission reports introduced in evidence. The question of the public convenience and necessity of the Dotsero cut-off had already been fully heard by the Commission and the substance of the evidence presented in that proceeding was embodied in Commission reports put into the record in the instant case. This Court has said in *United States* v. *Baltimore & Ohio, etc., Ry.*, 226 U. S. 14, 20, that the Commission may in one proceeding take notice of the results reached by it in other cases, "when its doing so is made to appear in the record and the facts thus noticed are specified so that the matters of law are saved." See also *Georgia Comm.* v. *United States*, 283 U. S. 765, 770.

That the Commission gave consideration to the essential facts which would arise from the testimony rejected is evidenced by the dissenting report of Commissioner Eastman (R. 34), wherein he sets out and approves the position taken by the appellants before the Commission and recites the facts which the appellants say they wanted to prove by the rejected testimony.

In addition to testimony merely reiterating facts already established and thus not material to the determination of the issues involved in the Section 5 (2) proceedings, the Commission excluded testimony which on its face would have amounted only to guesses and apprehensions that the Rio Grande would commit deliberate "*sabotage*" of the Moffat, its business and financial interest, regardless of the heavy investment which the Rio Grande would then

have in the very property damaged. Such improbable speculations which would leave out of consideration the protection which the courts and the Commission could give against such a corporate crime fully justified, we submit, the Commission's refusal to permit such unnecessary burdening of its record.

Not only were the basic facts already before the Commission, but much of the testimony offered was irrelevant to the issues involved.

Even though the Moffat was originally planned to extend westward beyond Craig, there is nowhere to be found any indication that it has at any recent time desired to undertake such construction. The Moffat did not oppose the application which the Bamberger made to the Commission in Finance Docket No. 4713, *Proposed Construction by Salt Lake & Denver Railroad Company,* in 1925, wherein entirely different interests sought permission to construct a line exactly like the Craig extension which the appellants allege to have been a part of the original Moffat plan.

The rejected evidence described in paragraph (1) above would, according to appellants, raise an implied obligation on the part of the Moffat, the Government, and/or commercial organizations to construct the Craig extension because of inducing representations to settlers. Clearly the existence of such an obligation could have no bearing upon

the proper determination of the question of control pending before the Commission.

That the tunnel was constructed at public expense and taxes levied upon the basis of an *expectation* that *someone might* build the Craig extension (see paragraph (3) above) could have no bearing upon the propriety of the Commission's approval of the Rio Grande control application, neither would evidence as to the details of the resources of the Uintah Basin. Let it be admitted that the conditions in the Basin were such that a railroad would be a public convenience and necessity—this would not mean that the construction of the Dotsero cut-off should not be expedited and assured. Undoubtedly both constructions are desirable from a local standpoint, but a builder has appeared for only one—the public need for the other is no reason that the one shall not be built.

Evidence bearing upon the public interest in the Dotsero cut-off (referred to in paragraph (5) above) and its financing was before the Commission in Finance Docket No. 4555, which involved the public convenience and necessity of the construction of the cut-off. (R. 143–161.) Practically all the interests which participated in No. 8070 were represented before the Commission in No. 4555, and after a long hearing the Commission authorized the construction with conditions which it imposed at the instance of the protestants. No

attack has been made by court proceeding provided for by statute, upon the Commission's order in the cut-off case. Additional evidence bearing upon the propriety of the Dotsero cut-off would have unnecessarily encumbered the record in the later proceeding and involved details already threshed out regarding an issue already decided.

Evidence of opposition by the Rio Grande to the Craig extension (referred to in paragraph (6) above) could have been offered only upon the theory that with the Moffat under Rio Grande control, the Moffat would never build the Uintah extension. But no probability has been shown that *without Rio Grande control* the Moffat would ever build the extension.

Finally, the appellants say that evidence referred to in paragraph (6) above was excluded to the effect that the control of the Moffat by the Rio Grande would enable the latter to wreck the former financially. The Commission's report indicates that the Commission had before it and considered the financial status of the two companies and the relationships that would arise from the control proposed. Appellants in their petition do not allege that any new basic facts were to be offered in evidence, but apparently wished to submit some deductions or arguments upon the subject.

Little of the evidence, the rejection of which the appellants complain of, was offered by the appel-

lants in this case. The testimony was offered by other parties who now make no objection to the Commission's action in the instant case. They offered the testimony to show the desirability of the Commission attaching conditions to the granting of the Rio Grande's application, and in practically every instance the Commission attached the condition suggested. In short, the appellants' whole case seems to be based upon the proposition that since the Uintah Valley needs a railroad, the Dotsero cut-off should not be encouraged; that though no one is willing to build the Craig extension, no other construction elsewhere, although badly needed, should be permitted if it might by some chance reduce the probability that some one might at some future time build the Uintah extension.

The opinion of the lower court, thus disposed of the question of whether appellants were afforded a fair hearing before the Commission (R. 129):

> * * * An analysis of the hearing indicates that some of the matters excluded were not offered in evidence by plaintiffs' counsel but by counsel representing other intervenors of which we think the plaintiffs can not avail themselves in this suit. These were matters for the others to complain about. This they have not done. On the contrary, they are here in support of the order of the Commission. Some of the matters that the intervenor-plaintiffs desired to introduce

were not pertinent to the precise issue then involved. Moreover, they had nothing tangible on which to base objections to the stock acquisition. Neither the plaintiffs nor any one else had a plan to do what all (with the probable exception of the Rio Grande) desired, namely: the extension of the Moffat Road west from Craig to the Uintah Basin. Nor was there any evidence of a likelihood of any plan being made until traffic conditions should inspire one.

Further the court said (p. 765, R. 130):

> * * * So it appears that the exclusion of evidence was not prejudicial to any rights which the plaintiffs claimed but was only disturbing to their hope that some how, some time, in some way the Moffat Road would be projected from Craig westwardly. Yet under the Commission's order the realization of that hope is preserved, for it expressly leaves open the way westward and makes it just as possible to extend the road with the order in force as to extend it with the order annulled. * * * all that the present order does adversely to the plaintiffs, on their own showing, is to disturb their hope of an early extension of the Moffat Road westward. * * *

CONCLUSION

We respectfully submit that the decree of the District Court dismissing the complaint should be affirmed.

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FEBRUARY, 1933.

APPENDIX

The following paragraphs of the Interstate Commerce Act as amended (41 Stat. 48, U. S. Code, Tit. 49, Sec. 5) are pertinent to this case:

Section 5 (2):

> Whenever the Commission is of opinion, after hearing, upon application of any carrier or carriers engaged in the transportation of passengers or propety subject to this Act, that the acquisition, to the extent indicated by the Commission, by one of such carriers of the control of any other such carrier or carriers either under a lease or by the purchase of stock or in any other manner not involving the consolidation of such carriers into a single system for ownership and operation, will be in the public interest, the Commission shall have authority by order to approve and authorize such acquisition, under such rules and regulations and for such consideration and on such terms and conditions as shall be found by the Commission to be just and reasonable in the premises.

Section 5 (3):

> The Commission may from time to time, for good cause shown, make such orders, supplemental to any order made under paragraph (1) or (2), as it may deem necessary or appropriate.

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